

DECISION



7.01207-00 119287
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE:

DATE: August 24, 1982

**B-207704
MATTER OF:**

Military Services of Monterey

DIGEST:

1. Bid to furnish audio cassettes packaged in boxes was properly rejected as nonresponsive to IFB identifying brand name item consisting of tapes packaged on trays. Trays were listed as a salient characteristic required before an alternate item would be approved as equal to the brand name product.
2. Contention that use of boxes to contain audio cassettes would be as effective as the use of trays and that, accordingly, agency's requirement for trays is an undue restriction on competition is untimely because the alleged defect was apparent in the IFB and the protest was not filed prior to bid opening.

Military Services of Monterey (MSM) protests the rejection of its bid to furnish bulk packaged audio cassette tapes which it submitted in response to Department of the Army Invitation for Bids (IFB) DAKF03-82-B-0081. The IFB was issued on a brand name or equal basis and specified Minnesota Mining & Manufacturing Company (3M) type SBC-60 "Scotch" Brand tape as the brand name product. MSM's bid was rejected because it proposed to furnish its tapes in cardboard boxes rather than packaging them on trays employing a retaining strip to hold the tapes in place.

In MSM's view, the Army has been sold nothing more than fancy packaging. It says the 3M packaging was not specified and that the packaging it offered is more than adequate to hold and protect its cassettes. It contends that its item can be used just as efficiently for its intended purpose as can the 3M item.

The Army, on the other hand, contends that MSM's rejection was proper because the container it would have furnished differs significantly from the plastic tray and retaining strip which the IFB identified as salient characteristics of the 3M product. The Army says it specified these characteristics because they are believed to be necessary to assure rapid, efficient loading of tapes during use. Moreover, it is now too late, the Army says, for the protester to question the rationale for such a requirement because the protester did not file the protest prior to bid opening.

We agree with the Army.

In the first place, the IFB states that for an alternate item to be considered equal to the 3M product, it include:

"25 cassettes per single tray with single strip to hold cassettes in place; plastic cover or wrapping provided for each tray to keep cassettes dust-free * * *." (Emphasis added.)

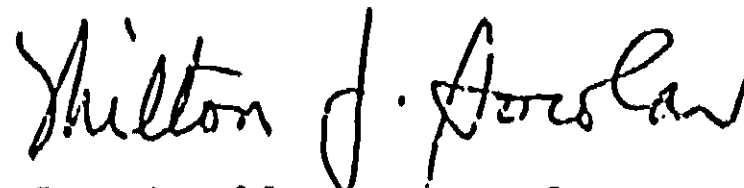
A tray is defined in Webster's Third New International Dictionary (G. & C. Merriam Co. 1971) as "an open variously shaped receptacle of wood, metal or other material with a flat bottom and a low rim for holding, carrying, or exhibiting articles * * * "(id. at 2434). A box, however, is "a rigid typically rectangular receptacle often with a lid or cover * * * constructed of a flat bottom and four upright solid sides" (id. at 263). A box plainly differs from a tray in the relative proportion of its sides to its base, a difference which on its face may bear on the accessibility of the contents carried.

With the emphasis placed by the IFB language quoted on the use of a tray, retaining strip and wrapping, the Army's listing of salient characteristics clearly implied that the use of a tray similar in design to 3M's tray was required and that the use of a box would not be acceptable. To be considered responsive, an alternate product offered in response to a brand name or equal solicitation must conform to the brand name product with respect to those characteristics which the IFB identifies as salient. Shepard Group, B-203417, December 15, 1981, 81-2 CPD 473.

Since MSM's product did not do so, its bid could not be accepted.

Second, we agree with the Army that MSM cannot now question the IFB requirement for the use of a tray and retaining strip. Our Bid Protest Procedures require that protests based on defects in a solicitation which are apparent prior to bid opening must be filed before bid opening. 4 C.F.R. § 21.2(b)(1) (1982). MSM's complaint that the Army's requirement for cassettes furnished on trays similar to those used by 3M is unduly restrictive of competition concerns an apparent defect in the solicitation which should have been, but was not, protested prior to bid opening. MSM's protest is in this respect untimely and is dismissed.

The protest is denied in part and dismissed in part.



Acting Comptroller General
of the United States